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IN THE

Supreme Court of the United States

October Term, 1957

NATIONAL PRODUCING CO., INC., a corporation, and GEORGE A. HAMID,

Petitioners,

against

FARRIS O. ANDERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on the 1st day of April, 1958.

Opinions Below

No opinion was rendered herein in the District Court.

The opinion of the United States Court of Appeals is not yet officially reported. A copy of the opinion is included in the Appendix hereto annexed.

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered on April 1, 1958.

Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

Questions Presented

(1) The United States Court of Appeals for the Second Circuit erred in its decision herein in that it affirmed the error (and sanctioned the procedure) of the United States District Court for the Eastern District of New York (Bruchhausen, D. J.) wherein the Court refused to take judicial notice of the pertinent public statute law, namely the Workmen's Compensation Act, of the State of Pennsylvania.

The aforesaid decision should be reviewed on certiorari (under Rule 19-b of the Rules of this Court) for the reasons (1) that the decision is in conflict with the decisions of other courts of appeal on the same matter; (2) that it is in conflict on a federal question with applicable decisions of this Court; and (3) that it has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

(2) The said decision of the Court of Appeals was, moreover, in error (which it is respectfully submitted should be reviewed on certiorari) in that it affirmed the judgment, as against the individual defendant, George A. Hamid, entered upon a verdict which was unsupported by any competent legal evidence.

Statute Involved

The statute involved in the questions here presented is Section 203 of the Workmen's Compensation Act of the State of Pennsylvania (77 Purdon's Pennsyivania Statutes Annotated, Sect. 52), as follows:

> "An employer who permits the entry upon premises occupied by him or under his control of a laborer or assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as his own employee."

Statement of the Case

The action was brought by plaintiff to recover damages for personal injuries sustained by plaintiff alleged to have been the result of defendants' negligence. Jurisdiction was based on diversity of citizenship.

The plaintiff, at the time of the accident, was an aerialist in the employ of one Peaches O'Neill. Plaintiff was one of a group of girls similarly employed. They were hired and paid by Peaches O'Neill, who also provided the rigging (or web) and the other apparatus, upon which the girls' act was performed.

Peaches O'Neill was an independent contractor who, for a consideration, furnished the said act to form part of a circus performance produced by others—in this case by the defendant, National Producing Co., Inc., which was regularly in the business of circus-production.

At the time of the accident (on May 6, 1952) the Peaches O'Neill-act formed part of a circus then being produced

under the sponsorship of the Shriners at the Jaffa Temple in Altoona, Pennsylvania. The Shriner organization had a contract with the National Producing Co., Inc., as general contractor, which produced the circus and assumed for that purpose control of the premises; it was conceded that the Shriners were in no way involved herein.

The National Producing Co., Inc. (as general contractor), had a contract with the said Peaches O'Neill (as subcontractor) whereby Peaches O'Neill agreed to furnish girl aerialists to perform individual aerial web numbers simultaneously, as an aerial ballet; the act consisted in part of the girls assuming certain poses, in and upon the rigging (or web) to music and in unison.

Without attempting to describe the act in detail, it is enough for present purposes to say that in the course of the act, plaintiff fell from a part of the apparatus to the floor about eighteen feet below; and it was plaintiff's contention that she fell because of alleged absence from the rigging of a safety loop.

Upon the trial, a verdict was rendered in favor of plaintiff in the sum of $55,000; and from the judgment entered thereon defendants appealed. Defendants contended upon the appeal, for one thing, that the refusal of the learned District Judge to take judicial notice of the pertinent Pennsylvania Workmen's Compensation Act was error requiring a reversal; and, secondly, as to the individual defendant, George A. Hamid, that there was no competent legal evidence to support a verdict against him.

ARGUMENT

I.

The refusal of the Courts below to take judicial notice of the law of the State of Pennsylvania constitutes error which should be reviewed on certiorari.

(1)

It is undisputed that, inasmuch as the accident happened in the State of Pennsylvania, the plaintiff's right to recover is governed by the law of that State.

Where the trial of an action for damages arising from an accident in the State of Pennsylvania is had in a United States Court held in the State of New York, the Court is bound (by authoritative decisions) to take judicial notice of the law of the State of Pennsylvania.

A leading case is *Lamar* v. *Micou*, 114 U. S. 218, 223, where this Court said:

> "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which *the courts of the United States are bound to take judicial notice, without plea or proof.*" (Italics added.)

To the same effect:

> *Mills* v. *Green*, 159 U. S. 651, 657;
> *Norfolk & Western Ry. Co.* v. *Norton*, 279 F. 32 (6th Cir.).

Applying this principle, it was held in *Slattery* v. *Marra Bros., Inc.* (2nd Cir.), 186 F. 2d 134, 138 (cert. denied, 341 U. S. 915) that the United States Court of Appeals would take judicial notice of the New Jersey Workmen's Compensation Law.

The reason for the different rule applied in this respect in the United States courts from that of the state courts (where each State is for this purpose generally deemed foreign to the others) was pointed out in *Strickland* v. *Humble Oil & Refining Co.* (5th Cir.), 140 F. 2d 83, 86, where it was said:

> "But in a court of the United States no State of the Union is a foreign state. The judge judicially notices the law of them all, and may inform himself in such manner as he chooses."

A like distinction was referred to by Chase, C. J., in *In Re Paramount-Publix Corp.* (2nd Cir.), 85 F. 2d 83, 86; and by Frank, C. J., in *Zell* v. *American Seating Co.* (2nd Cir.), 138 F. 2d 641, 643, where he said:

> "But the federal courts take judicial notice of the decisions of the several states; the doctrine of judicial notice being a rule of evidence, we *must*, under Federal Rules of Civil Procedure, Rule 43 (a), 28 U. S. C. A., following section 723-c, apply it here and take notice of the Michigan decisions." (Italics added.)

(2)

In the case at bar, when plaintiff rested, defendants' counsel asked the Trial Court to take judicial notice of the law of Pennsylvania, particularly section 203 of the Workmen's Compensation Act above quoted. The colloquy that followed, wherein the Court refused defendants' request, is set forth in full in the extract from the record included in the Appendix annexed hereto.

Plaintiff's counsel there contended (in line with the generally prevalent state practice) that for the Court to take judicial notice of the law of Pennsylvania, it must have been pleaded in the answer as an affirmative defense; but in this plaintiff's counsel was plainly in error.

A similar contention was made and an adverse ruling had thereon in *Kaye* v. *May* (3rd Cir.), 296 F. 450, 453; and see also, *Baltimore & Ohio R. Co.* v. *Reed*, 223 F. 689, 697; *Rothschild* v. *Ritter*, 4 F. R. D. 495; and *Bauman* v. *Aluminum Co. of America*, 58 F. Supp. 160, 162. In the case last cited it was held by the learned judge in the District Court, Eastern District of New York, that not only must the Court take judicial notice, *without plea or proof*, of the law of another state (Arkansas), but that when such law had been pleaded in the answer as an affirmative defense, it would be stricken.

Defendants' counsel, at all times throughout the colloquy, continued to urge that the District Court should take judicial notice (without plea or proof) of the Pennsylvania statute; and counsel never abandoned or changed his position in this respect.

In view, however, of the plaintiffs' insistence that the law of another state must be pleaded, defendants' counsel said that while he really did not feel an amendment was necessary, nevertheless "as a matter of form," he would move that the answer be deemed amended to set forth the statutory law in effect in Pennsylvania, consisting of Section 203 of the Pennsylvania Workmen's Compensation Act (Appendix, pp. 13a-14a).

Judge Bruchhausen reserved decision on the motion, and on the question of taking judicial notice, pending the luncheon recess; and after the Court reconvened he announced that, considering all the factors, he denied the motion to amend, and he said further that, in view of the denial, he deemed it unnecessary for him to determine whether or not judicial notice should be taken. Thereupon defendants' counsel sought repeatedly a specific ruling on the question of judicial notice; and it ended with the Court saying (of the application to take judicial notice) that it was denied (Appendix, pp. 18a-19a). So that the net result and final outcome was that the Court refused to

take judicial notice of the Pennsylvania statute. The further net result was that the case was tried with only part of the Pennsylvania law (the *lex loci*) before the Court—to great injustice to the defendants.

The denial of the motion to amend had nothing whatever to do with the outstanding and fundamental right to have the Court take judicial notice of the law of Pennsylvania; and the learned Judge was in error in holding otherwise.

As a result, by reason of a purely technical procedural position, assumed by plaintiff and adopted by the Trial Court, defendants have been deprived of their undoubted right to have the case heard and disposed of in accordance with the law of the State of Pennsylvania—where the accident occurred.

Defendants' counsel, as an additional reason why the Trial Court should take judicial notice of the Pennsylvania statute, had referred to Rule 43-a of the Federal Rules of Civil Procedure, to the effect that all evidence should be admitted in a United States court which would be admissible under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court was held; and defendants' counsel said that this rule should be read in conjunction with Section 344-a of the New York Civil Practice Act, which authorized the state courts to take judicial notice of the statutes of a sister state.

The Court of Appeals herein was apparently of the opinion that by making specific reference to Rule 43-a and Civil Practice Act, Section 344-a, defendants' counsel had waived any right to rely upon the well recognized rule of law that federal courts are bound to take judicial notice of the public statutes of every state; but such was not defendants' position, nor did it have any such effect.

As above stated, at all times defendants' counsel stressed and insisted upon the application herein of the

general principle that federal courts are bound to take judicial notice of the law of the several states.

It will not do to say (as may the plaintiff's counsel) that the Pennsylvania statute, by its terms, would not apply herein; for here the defendants were precluded at the threshold from any consideration of the scope, operation or extent of the Pennsylvania statute.

Consideration of the meaning and purpose of the Pennsylvania statute might well have been had herein, were it not for the fact that defendants were foreclosed therefrom by the erroneous ruling of the learned Trial Judge that he would not take judicial notice of the statute. That there was no discussion or interpretation of the statute was due solely to plaintiff's attitude. It may, however, be added that, under the relevant Pennsylvania decisions, the instant case (where, as above pointed out, National Producing Co., Inc., was the general contractor and Peaches O'Neill, plaintiff's employer, was a sub-contractor) apparently comes well within the statute (*McDonald* v. *Levinson Steel Co.*, 302 Pa. 287, 294; *Sarne* v. *Baltimore & Ohio R.R. Co.*, 370 Pa. 82; *Rivera* v. *Turner Construction Co.*, 135 F. Supp. 553, interpreting the Pennsylvania statute).

II.

The case presents other errors of law which should be reviewed on certiorari.

It was conceded that plaintiff could succeed against the individual defendant, George A. Hamid herein, only upon proof that there existed (at the time of the accident) a partnership between said Hamid and one Robert H. Morton (deceased at the time of the trial) who was the active factor in the circus production. Defendants contend that there was no competent legal evidence of such partnership.

(1) To establish the alleged partnership, plaintiff offered in evidence a certificate of a partnership (dated April 20, 1944, more than eight years before the accident) between three persons, Hamid, Morton and one Barry—the partnership to be known as "Hamid-Morton-Barry"; by the terms of the certificate, the partnership was to be formed to organize and operate an out-door circus *exclusively* in the Dominion of Canada for a period of three years from the date of the agreement, the circus to be known as the Hamid-Morton Circus; any extension of the partnership had to be endorsed by the parties at the foot of the agreement, and no such extension or endorsement was ever had—actually the partnership was terminated (according to the uncontroverted testimony) within about four to six weeks after its formation.

To deduce (as did the Courts below) from the defunct partnership between three persons, the existence of a different partnership between two persons, eight years later (especially without any proof of what happened in the intervening six-year interval) was obvious error.

(2) Plaintiff based her argument for a partnership between Hamid and Morton mainly upon matters contained in a book entitled "Circus."

This 253-page volume recited on its title page that the book was "*by George A. Hamid, as told to his son George A. Hamid, Jr.*" The matters related in the book by Hamid, Jr. (as appears from the aforesaid inscription on the title page) were plainly hearsay—they were incompetent against the defendant for any purpose. The testimony of defendant Hamid (and it is uncontradicted) was that the book was published in 1950 while he was in Europe; he never saw it until his return; he first read the book in the winter of 1951—after it was published; when the Court suggested that only pertinent parts of the book be read in evidence, plaintiff's counsel insisted that the book as a whole (with all its loosely-made hearsay statements) be put in evidence, and it was so marked.

Because the book was copyrighted, and the application for copyright contained a recital that George A. Hamid was "author", plaintiff contended that all the substantive statements made in the book (without regard to time or context) *must be taken as true* and as admissions made by and receivable against the defendant Hamid. Recitals in the application or in the certificate of copyright are manifestly there included for a specific purpose—it is not to affirm as true all the statements (obviously hearsay) contained in the copyrighted volume.

(3) To bolster up the plainly insufficient proof of the alleged partnership, plaintiff's mother was called upon to testify to an alleged conversation with Colonel Morton, who had died before the trial. Upon established principles, the testimony was inadmissible (68 C. J. S. "Partnership", Sec. 53, p. 901, citing *Murphy* v. *Oversmith*, 242 App. Div. 901 (N. Y.), where it was said that "Declarations of one partner that another is his partner are not competent to establish the partnership"; and *Pryor* v. *Hale-Hassell Grocery Co., Inc.*, 80 F. 2d 995, 997 (10th Cir.), where it was said that such declarations are only admissible after a *prima facie* showing of partnership has been made by other evidence"—which (as hereinabove pointed out) was wholly lacking in the instant case.

Reasons for Granting the Writ

The reasons for granting the writ herein, pursuant to Rule 19 (b) of the rules of this Court, have been set forth on page 2 hereof.

CONCLUSION

Petitioners respectfully submit that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

THOMAS A. GAFFNEY,
Counsel for Petitioners.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 200—October Term, 1957.

(Argued January 8, 1958 Decided April 1, 1958.)

Docket No. 24900

FARRIS O. ANDERSON,

Plaintiff-Appellee,

—v.—

NATIONAL PRODUCING CO., a corporation, and GEORGE A. HAMID,

Defendants-Appellants.

Before:

HINCKS, LUMBARD and WATERMAN,

Circuit Judges.

In an action to recover damages for personal injuries allegedly caused by negligence of the defendants, National Producing Co. and George A. Hamid appeal from a judgment for the plaintiff for $55,000 entered on the verdict of a jury by Walter Bruchhausen, *J.*, Eastern District of New York. Affirmed.

Opinion.

RICHARD W. CONDON, New York, N. Y. (James L. Nelligan, New York, N. Y., on the brief), *for plaintiff-appellee.*

RALPH STOUT, New York, N. Y. (Abraham Males and Louis Rothbard, New York, N. Y., on the brief), *for defendants-appellants.*

LUMBARD, *Circuit Judge*:

This is an appeal by the defendants, National Producing Co. and George A. Hamid from a judgment for the plaintiff for $55,000 entered by Judge Bruchhausen, Eastern District of New York, on the verdict of a jury.

The plaintiff, an aerial acrobat, was in the employ of one Peaches O'Neill who was engaged by the defendant National Producing Co. to supply an aerial act to The Hamid-Morton Circus. On May 6, 1952, during a performance in the Jaffa Shrine Temple at Altoona, Pennsylvania, where plaintiff was one of six girl aerialists, the plaintiff fell 18 feet from the rig where she was performing, thereby breaking both heels and suffering injuries to her spine. Miss Anderson alleged that the fall was caused by the absence of a safety loop on the rig and that this was due to the negligence of the riggers who were employees of the National Producing Co. and of The Hamid-Morton Circus.

Suit was brought against the National Producing Co. and George A. Hamid, the appellant, who, concededly, is not individually liable unless there was a partnership between Hamid and Col. Robert H. Morton. Morton actually ran the circus. He was the president of the corporate defendant and all its stock was held or controlled by him. Hamid's defense was that no partnership existed.

Opinion.

As there is ample evidence in the record to sustain the plaintiff's theory that the injuries occurred because of the negligence of the defendants' riggers, the main question before us is whether there was sufficient evidence of Hamid's partnership with Col. Morton to support the jury's verdict against Hamid as a partner. In our judgment a review of the record discloses ample evidence from which the jury could find that Hamid and Morton, in the words of the Uniform Partnership Act, §6, systematically "carried on as co-owners, a business for profit."

In summarizing the proof we include two items of evidence which appellants urge should not have been received, as we find this evidence was properly admitted for reasons we state below. The two disputed items are:

1. A written partnership agreement executed in 1944 between Hamid, Morton and one Barry to carry on the circus business in Canada.

2. A book entitled "Circus" purporting to be the autobiography of defendant Hamid "as told to his son George Hamid, Jr."

The proof was as follows: The route card showing where the circus played in 1952, listed it as the "Hamid-Morton Circus" and gave its address as 10 Rockefeller Plaza, New York, which was then Hamid's office. No "showing dates" could be contracted for unless confirmed by the New York office, for the Altoona date the card noted "(Only acts confirmed by New York office used)."

In a book copyrighted November 21, 1950, entitled "Circus" which purported to be an autobiography of defendant Hamid "as told to his son George A. Hamid, Jr." a picture shows "The Hamid-Morton Circus," and there are numerous items referring to Hamid owning and having his own circus and his pride in doing so. Pages 246 and 247 of the book describe in detail how Hamid and Morton went into

partnership in the "Hamid-Morton Circus," and states "We shook hands on the deal—no written contracts. I was to put the shows together and he was to handle them on the road."

Sometime before this, in 1944, Hamid had formed a partnership with Robert Morton and one Howard Y. Barry, which, according to Barry's testimony, terminated a few weeks later. But in view of the other evidence it was permissible for the jury to conclude that Hamid and Morton continued as partners. At the trial Hamid admitted the 1944 partnership although he had previously denied it on his deposition. Hamid also conceded that in May 1954 he shared profits with Morton but claimed he was not to share any losses.

While Hamid himself testified and contended that his only relationship with the circus was that of booking agent who furnished the acts, many of the admissions he was forced to make, in his deposition and at the trial, supported the plaintiff's claim of his partnership interest: (1) He autographed and sent to many friends copies of the book "Circus" which purported to be his autobiography; (2) He actively traveled with the circus after Morton's death, doing work Morton used to do, feeling "obligations to his widow, and to contracts which had been committed, and committees called and asked if I would pitch in to help out in this emergency. I neglected a lot of my other business in order to do so, and I did."; (3) Shortly before the trial the program for the circus at Palisades Park stated that it was "Under the personal direction of George A. Hamid, Sr."; (4) After Morton's death he asked Morton's widow for an accounting; (5) Although on his deposition Hamid had denied ever being in partnership with Morton and one Howard Y. Barry, at the trial he admitted there had been such partnership in 1944 when he was confronted with Barry's testimony and a certificate of the partnership certified by the County Clerk of New York County.

Opinion.

This summary of the evidence bearing on the Hamid-Morton partnership helps to dispose of the two objections to the admission of evidence, which we now consider.

As to (1), the partnership agreement, this was clearly admissible to refute Hamid's testimony on his deposition that he had never been a partner of Morton, and thus impeach his credibility. *Lee Dong Sep* v. *Dulles*, 220 F. 2d 264 (2 Cir. 1955); 3 Wigmore, Evidence §§1017, 1018 (3rd Ed. 1940). In view of Hamid's admitted connection with this circus for many years, the partnership agreement was admissible in any event as it was evidence of the nature and extent of their relationship, which, when taken with the other evidence, was relevant to the question of their alleged partnership in May 1952.

As to (2), the admission in evidence of the book "Circus," subtitled as the defendant Hamid's autobiography, was proper for two reasons. First, the certificate of copyright registration and the current catalogue of copyright entries both showed George A. Hamid and his son to be the authors of the book "Circus." 17 U. S. C. A. §§209 and 210 respectively provide that the certificate and the catalogue "shall be admitted in any court as prima facie evidence of the facts stated therein." There is no reason to limit the use of such evidence. The language of the statute is clear. Even though the registration has been made by the publisher, the circumstances and reasons for the registration are some guarantee that authors are sufficiently safeguarded against the likelihood of inaccurate registration. Having established prima facie the authorship of the book, any statements in it bearing on the issues were relevant as admissions of George A. Hamid. He was free to disclaim the prima facie showing but, as we have pointed out, his cross examination, far from refuting the records, seems to have confirmed his responsibility for the book and the statements in it which bore

on his partnership with Morton in the Hamid-Morton Circus.

The appellant also assigns as error the admission of testimony of the plaintiff's mother to the effect that on May 7, 1952, the day after the plaintiff's fall, she went to the circus to get her daughter's trunk. Over objection she testified that she talked with Morton. She first asked for Mr. Hamid, but was told by Morton that he, Morton, was Hamid's partner, that Hamid was not then in the city, but that he, Morton, would talk to her. She informed Morton that she had come for her daughter's personal belongings and that her daughter had told her she fell because there was no safety loop on her rigging. To this Morton replied that he had personally checked the rigging after the accident and ordered the riggers to put on a safety band at once. Although there is authority to the effect that a statement of an alleged partner may be admitted to show the existence of the partnership if a prima facie showing has been made by other evidence, *Pryor* v. *Hale-Hassell Grocery Co., Inc.*, 80 F. 2d 995, 997 (10 Cir. 1936); *Katz Exclusive Millinery* v. *Reichman*, 14 F. R. D. 37 (W. D. Mo. 1953) it is not necessary for us to pass on that question in this case. Here the joint activity over a long period of time, the sharing of profits, the partnership certificate filed in 1944, the use of the name Hamid-Morton Circus, the admissions in the book, clearly pointed to the existence of the partnership and any error, if it was error, resulting from the admission of Mrs. Anderson's testimony was harmless.

Hamid's personal liability does not depend upon an express agreement to share losses as Hamid earnestly contends. For the agreement to share losses may be inferred where all of the other elements of a partnership are present. *Mill Factors' Corp.* v. *Margolies*, 210 App. Div. 739, 206 N. Y. S. 434, 437, for history after remand see 219 App.

Div. 783, 220 N. Y. S. 888, appeal dismissed 245 N. Y. 602, 157 N. E. 875. See 68 C. J. S. 449.

Moreover, the district judge properly charged the jury on the theory that Hamid might be found liable as a joint adventurer as well as on the partnership theory. The basis and scope of the liability of a joint adventurer in this situation is indistinguishable from that of a partner. However, under the law of New York it is clear that a joint adventure may exist without a sharing of losses. *Mariani* v. *Summers*, 52 N. Y. S. 2d 750, 755, affirmed 269 App. Div. 840, 56 N. Y. S. 2d 537 (First Dept.); *Usdan* v. *Rosenblatt*, 93 N. Y. S. 2d 862.

Thus, whether the verdict was based on a partnership or a joint adventure theory, the absence of an express agreement to share losses is not fatal.

Appellants also claim the district judge erred in denying their motion to amend the answer, made at the end of plaintiff's case, to set up §203 of the Pennsylvania Workmen's Compensation Act[1] as a defense. This was an affirmative defense and could not be availed of under a general denial. Rule 8(c) Federal Rules of Civil Procedure, 28 U. S. C. A. The motion was not made until eight days after the trial had started. The answer had been filed for over three years. All the pre-trial examinations had been taken and the plaintiff had closed her case, resting it on a theory of common law negligence, before the defendant brought up this new matter. Judge Bruchhausen in a proper exercise of his discretion denied the motion as coming too late. Rule 15 (a) Federal Rules of Civil

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[1] "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

Procedure, 28 U. S. C. A., *Shick* v. *Fuch*, 8 F. R. D. 639 (S. D. N. Y. 1944). The appellant also argues that the District Court should have taken judicial notice of the Pennsylvania Workmen's Compensation Act under §344a of the New York Civil Practice Act. Rule 43a Federal Rules of Civil Procedure, 28 U. S. C. A. Section 344a expressly gives the trial court discretionary power and we see no abuse of discretion in refusing to take notice of the Pennsylvania Act when it was not pleaded and when the judge properly denied the motion to amend the pleadings under the circumstances we have set forth above.

The other claims of error are so patently without merit that they do not warrant discussion.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of April one thousand nine hundred and fifty-eight.

Present: HON. CARROLL C. HINCKS,
" J. EDWARD LUMBARD,
" STERRY R. WATERMAN,
Circuit Judges.

FARRIS O. ANDERSON,

Plaintiff-Appellee,

v.

NATIONAL PRODUCING COMPANY and GEORGE A. HAMID,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Extract From Record

(310a) The Court: All right, does plaintiff rest?

Mr. Condon: Yes, your Honor.

The Court: Take a five-minute recess.

(A five-minute recess was taken at this point.)

Mr. Rothbard: I take it, your Honor, that the Court will take judicial notice of the laws of Pennsylvania?

The Court: I think not.

Mr. Condon: I think, your Honor, we are now going to discuss the matter of Pennsylvania law.

The Court: The first item is, before you get to that, whether or not this Court can take judicial notice of the law of Pennsylvania.

Mr. Condon: I don't think there is any doubt about it, your Honor, if the matter is pleaded and set up in the pleadings. However, I would like the record to show—

The Court: I think that is what they want to do, to plead.

Mr. Condon: Yes.

The Court: Maybe I better hear the application of Mr. Rothbard and then you may reply, if you see fit.

Mr. Rothbard: Preliminary to my application, your Honor, I was inquiring of the Court, I think it is the rule, I don't think there is any doubt, that this Court will take judicial notice of the Pennsylvania statute, that is so, is it not, your Honor?

The Court: Well, I haven't checked it, but I think Mr. Condon has added that, if it is pleaded, isn't that it?

Mr. Rothbard: Whether pleaded or not, first my preliminary question is,—it is our contention—the (311a) defendant contends that this Court, by its rules, does and must take cognizance of the statutes of the State of Pennsylvania. I have referred to the specific rule in the memorandum.

The Court: Yes, I am looking at it now.

Mr. Rothbard: And the appropriate civil practice act provision.

The Court: I wonder if you have cited the right section here. I don't see it, Rule 42.

Mr. Rothbard: Professor Stout who wrote this memo says—

The Court: Which you alluded to in my volume, it speaks of consolidation of trials.

Mr. Rothbard: Well, the first reference is that Rule 42A of the Federal Rules of Civil Procedure provided, "All evidence shall be admitted—"

The Court: What I am trying to find is the rule, Mr. Rothbard, I don't find the rule in my volume here as Rule 42.

Mr. Rothbard: 42A.

The Court: 42A is consolidation of cases, there is some error.

Mr. Rothbard: I think—no matter whether the rule—it may not be properly numbered, but what is quoted matter has always been the practice in this court, which is, that all evidence shall be admitted which is admissible under rules of evidence applied in general jurisdiction in the state in which the United States Court is held and then we go to show 44A of the Civil Practice Act authorized the courts of New York State to take judicial notice of the statute of another state. And 43A—43A,* would that help, your Honor?

---

* Rule 43(a) of the Federal Rules of Civil Procedure, which provides, so far as material, as follows:

> (a) *Form and Admissibility.* • • • All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. • • •.

The Court: It may be 43A, it speaks of evidence.

Mr. Rothbard: The above quotes under Rule 43A, the rule with respect to judicial notice of the statutes (312a) of law of another state is extended to the United States District Court in New York State.

The Court: You are probably reading something different than I have here, although it does say something about evidence. I don't disagree with you. It seems to me that that is so.

Mr. Rothbard: So we then come to the next point, here is a resident of Kentucky.

The Court: Yes, I imagine the major item we have to consider here is whether or not it is relevant to this case.

Mr. Rothbard: Well, as your Honor said, on the item of partnership and copyright, I think the question was first of its admissibility or competency, how probative it was.

The Court: That is right.

Mr. Rothbard: What weight we shall attach.

The Court: The first item is the item of admissibility. We have now the category whether it is relevant.

Mr. Rothbard: Now, we have a resident of Kentucky injured in Pennsylvania and I think your Honor was the first one who raised the point in chambers at the very beginning of this trial, as to what law of what state applied. You Honor, Mr. Condon and I were in agreement that the law of Pennsylvania applied.

Mr. Condon: That is not my statement at all that I am in agreement on the act.

Mr. Rothbard: Well, that is definitely so.

The Court: I only mentioned that it was informal, along the line.

Mr. Rothbard: That is true, we agreed.

The Court: It is usual wherever you have some controversy, that the substantive law, of the place of that controversy or injury—

(313a) Mr. Rothbard: That must apply.

The Court: —applied.

Mr. Rothbard: That has always been the rule. If I am injured in California whether by motor vehicle or otherwise, or other mishap, the law of that place will govern my rights.

The Court: The substantive law.

Mr. Rothbard: Surely, then substantive law is always implemented by statutory law. This plaintiff can't say—

The Court: What I am speaking of is substantive law.

Mr. Rothbard: You mean common law.

The Court: Substantive law as distinguished from procedure.

Mr. Rothbard: Substantive law would include statutory law. Now, here is a lady who is injured in the State of Pennsylvania, admittedly the law of Pennsylvania as it then existed would state what are the respective duties and obligations of the people to a lawsuit. Just because the plaintiff in a complaint—as a matter of fact I have never seen such a skimpy complaint, there is no allegation of partnership, no allegation of ownership, or control, there is no allegation that—

The Court: You needn't elaborate on this.

Mr. Rothbard: So they prefer to make no reference to Pennsylvania law. If they didn't know about it, that is no excuse either, if they did not know about it, then it was omitted. But that doesn't alter the fact that Pennsylvania law, in effect at the time this girl was hurt, governs the rights and mutual obligations of this party.

The Court: All right, what is your application?

Mr. Rothbard: The defendant—I really don't feel that an amendment is necessary, because if the (314a) Court takes judicial notice of the laws of that state, then I need only call your Honor's attention the existing law at that time. As a matter of form, I move that the answer presented by someone other than myself, be deemed amended

to set forth the statutory law, in effect in Pennsylvania, at the time of this mishap, and that consists of Section 203 of the Pennsylvania Workmen's Compensation Act, the volume of which I have given to your Honor, and I ask that our answer be deemed amended in that respect. I think it is just a matter of form. We couldn't aiter—

The Court: I understand your point. What do you say, Mr. Condon?

Mr. Condon: I have this to say. First parenthetically, as you know, I have not interrupted Mr. Rothbard at all in his argument. I hope I will not be interrupted by Mr. Rothbard.

The Court: Go ahead.

Mr. Condon: As to the complaint itself, I think your Honor will see it is drawn in accordance with such a complaint, according to rules. As to this doctrine Mr. Rothbard is now raising for the first time by a motion at the close and completion of the plaintiff's case, if Mr. Rothbard wished to rely on the law of Pennsylvania, he should have set that up in his answer well in advance of the trial. That would be a terrific entrapment if he waited until the plaintiff's case is finished and say, now, "We will change the rules and have some other law." If that law should have applied he should have so stated long before the trial commenced. You can't get in the middle of a stream and say, "Now, we will change the rules around."

The Court: What do you say is applicable to the situation?

(315a) Mr. Condon: I say, your Honor, under the rule in the Federal Court, and I have had it before in the Southern District, the rule is that unless the pleadings alleged some other law, the law of the forum is deemed to apply, on the presumption that is the same as the law of the situs of the place or whatnot. But if you want to

apply other law, you have got to warn people. You can't wait until they finish the plaintiff's case and then come in and say, "We are going to shift and try some other law." It is entirely too late for that now.

Mr. Rothbard: Let's see if Mr. Condon is finished.

The Court: He says you are too late.

Mr. Rothbard: Let's take the subject entrapment; who did the entrapment? The plaintiff is presumed to know the law that governs her rights, her counsel omitted all reference to that law. He would like to have the law of New York apply, where admittedly and in conscience, as it is a matter of custom, the rule of law has always been—every student has been taught it, that the place where you are hurt, it is the law of that place that will govern every right. That is academic and fundamental. So who is entrapped, the plaintiff or the defendant? They either don't mention or don't want to mention it. So we are to be penalized because we discovered in Pennsylvania there are certain laws? If they didn't know it, then it is ignorance.

The Court: He said, as I understand it, there is some rule or decision of the Federal Court that indicates the law be applied unless the rule—

Mr. Rothbard: I think in the absence of other law.

The Court: Is there any case of authority on that point?

(316a) Mr. Rothbard: I would like to see a case where specific laws shall be deliberately ignored once called to a Court's attention. We didn't bring this lawsuit. This is the plaintiff's suit.

The Court: I am trying to analyze the point that Mr. Condon mentioned.

Mr. Condon: That thing arose in a case which came before Mr. Justice Waring, who is in North Carolina.

The Court: Was there some decision on that?

Mr. Condon: Well, it never—we wanted to, and the other side never appealed it, so it is not reported, but it came up in the Southern District before a North Carolina judge, Waring, who was sitting here from the Southern District in North Carolina, and that proposition appeared in this case.

The Court: Was there any authority stated?

Mr. Condon: No, your Honor, there was some authority, and it is my best recollection, I believe quite strongly that I am right, if you want, if Mr. Rothbard wants to rely on the law of Pennsylvania, it is up to him in his answer to set that forth and let everybody, the Judge, the plaintiff, and—

Mr. Rothbard: I can answer—

Mr. Condon: Just one moment, let everybody know at the start of the trial.

Mr. Rothbard: How about letting us know on what law you depend on bringing the suit? You have the burden? We have a right to put in a general denial. You say, at the time my client was hurt a certain law was applicable. We admit as lawyers the law of the place where she was hurt ordinarily would apply. So while ignoring that existing law, if you didn't know it, you were remiss. If you did know it, it was kept out deliberately. Either way, you want the defendant penalized be- (317a) cause you have not sought to plead or call to the Court's attention the law which then dictated your client's rights.

The Court: I think I should reserve decision on this matter. It wouldn't change the nature of the proof, and possibly before we get through, you may have some further light on it.

Mr. Rothbard: That could be.

The Court: I reserve decision on the matter.

* * * * *

Motions.

(321a) The Court: I have your point, I think, gentlemen. We don't want to keep the jury out there too long. They will be wondering whether we are participating in the trial or not. I would think it would be wise now to recess until 2 P. M. I will reserve decision for the moment. You may call the jury in right here. They don't have to go into the box.

Mr. Rothbard: Has you Honor made a ruling on my motion to amend the answer?

The Court: No, I am reserving decision.

Mr. Rothbard: On that, too?

The Court: To weigh these matters between now and the resumption of the case.

(The jury filed into the courtroom, standing before the bench.)

The Court: Ladies and gentlemen, I just want to say it is getting close to one o'clock and we will recess until 2 P. M.

(Court adjourned until 2 P. M.)

(322a) The Court: First, on the matter of this statute of Pennsylvania, I understand you wish to amend the answer under statute Section 293 of the Pennsylvania Workmen's Compensation Act, am I right in that, Mr. Rothbard?

Mr. Rothbard: That is a part of the application. The other is to have your Honor take judicial notice of the statute.

The Court: Well, first on the question of the pleading, as I have examined it—as many cases as time permitted—and taking into consideration all of the factors, the time of the making of this application, and all the other matters, I have concluded that the motion should be denied.

Mr. Rothbard: To that I except.

The Court: I think it is unnecessary to take judicial notice in lieu of that.

Motions.

Mr. Rothbard: Does your Honor deny my application that you take judicial notice of the law?

The Court: I think it is unnecessary to take judicial notice. I just said in connection with the proposed amendment, it would be superfluous.

Mr. Rothbard: It seems to me, your Honor, that considering the rights of the defendants, they ought to have the position taken that by judicial notice the statute of Pennsylvania be noted or declined to be noted so that—

The Court: I will make a ruling on that and for all the reasons that I have stated. I determined that it is unnecessary to consider the matter of whether or not judicial notice should be taken.

(323a) Mr. Rothbard: To your Honor's declination to rule on my application that the Court take judicial notice of the Pennsylvania law, I respectfully except. On the other denial I also respectfully except. I urge it is not our burden to call the law of Pennsylvania to your attention. It is the plaintiff's burden. This is a plaintiff's lawsuit.

The Court: Yes, I am fully aware of your position, Mr. Rothbard. I made my ruling. As to the other motions made by the defendant, they are denied.

Mr. Rothbard: To that I except.

The Court: All right, are you ready to proceed?

Mr. Rothbard: I thought your Honor said before we adjourned you were going to give us a chance to file a memo.

The Court: I don't think that was so. If so, I will be glad to be reminded of that.

Mr. Rothbard: I understood that you said you wanted that.

The Court: In view of that I will reserve decision on all motions other than the one connected with the Pennsylvania statute. I don't want to deprive you of any opportunity.

Motions.

Mr. Condon: I am not quite clear on the status of that. What motion is decision reserved on?

The Court: On all motions made by the defendant other than the one respecting the Pennsylvania statute.

Mr. Condon: And that is denied?

The Court: Yes.

Mr. Rothbard: And to the reservation I think your Honor suggested it would be better that the defendant take exception to the reservation?

The Court: All right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL PRODUCING CO. INC., a corporation, and GEORGE A. HAMID,

Petitioners,

v.

FARRIS O. ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

National Producing Co. Inc., a corporation, and George A. Hamid,

Petitioners,

v.

Farris O. Anderson,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals, not yet reported, is contained in the Appendix to the Petition for writ of certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on April 1, 1958. The petition for a writ of certiorari was filed on May 16th, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

First: Did the District Court during the trial of the case err in refusing to permit these petitioners, the defendants below, to amend their answer to plead an affirmative defense?

Second: Was there evidence to support a verdict against the individual defendant Hamid?

Reference Note

All folios cited in this brief are those contained in petitioners' appendix submitted to the Court of Appeals and now on file in this case in this Honorable Court.

Statement of the Case

On May 6, 1952 while plaintiff was performing in the Hamid-Morton Circus at the Shrine Temple in Altoona, Pennsylvania, she fell owing to the negligence of the defendants (petitioners here) and suffered most serious injuries. This Shrine Temple was occupied and controlled by the Shrine which is in no way involved in this litigation. Her spine was broken in two places, her pelvis was broken in two places, and both heel bones were broken. These injuries are permanent and prevent her from ever again pursuing the only line of work which she knows and for which she was trained.

According to the statement of defendants' witness, Butler (Defendants' Exhibit D in evidence), the aerial rigging from which plaintiff fell was set up by the riggers of "The Hamid-Morton Circus". The negligence is made crystal clear by this witness, Butler, who states as follows:

> "I looked at the hand loop immediately following the accident and found that there was no safety loop

there. When Miss Anderson noticed that the safety loop was not there and started to come down, the rigging jerked, which threw her out of the rigging and she fell to the ground. If the safety loop had been there this jerk would not have caused her to fall. In my opinion, therefore, the accident was entirely attributable to the absence of the safety loop."

(Certified exhibit submitted herewith.)

The plaintiff obtained a unanimous verdict which was approved by the trial judge in these words, "I must say that the evidence amply supports your verdict" (fols. 1640-1641). The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court and thereafter unanimously denied petitioners' application to stay the issuance of its mandate pending application for writ of certiorari.

ARGUMENT

POINT I

The trial court did not err in refusing to permit these petitioners, the defendants below, to amend their answer to plead an affirmative defense.

The petitioners herein appear to misconceive the basis for the ruling of the trial court. On June 4, 1957, the defendants for the first time moved at the trial to amend the answer (fol. 965). At that point the trial had been in progress eight days, i.e., since May 27, 1957 (fol. 4). The case had then been pending for four years, the answer had been filed for almost four years (fol. 2) and the pre-trial hearing had been held. Thus, at that late date, after all depositions had been taken, and after the close of plaintiff's case, and after plaintiff had rested (fol. 928), counsel for defendants moved for the first time to amend the answer "to set forth the statutory law in effect in

Pennsylvania, at the time of this mishap, and that consists of Sec. 203 of the Pennsylvania Workmen's Compensation Act" (fols. 940-942). No proposed written amended answer was offered. The motion was denied by the trial judge (fol. 965). From the Pennsylvania Workmen's Compensation Act, Section 203, set forth in full at the top of page 3 of petitioners' brief herein, petitioners argue that the compensation law of Pennsylvania afforded the exclusive and sole remedy available to plaintiff and that therefore plaintiff's case at common law in negligence must be dismissed.

The petitioners misconceive the ruling below in asserting that the trial judge and the Court of Appeals refused to take judicial notice of the Pennsylvania statute. Such was not the question at all. The question very simply was whether or not "matter constituting an avoidance" such as this could be proven under a general denial, which was defendants' only plea, or whether such matter must under Rule 8(c) of the Federal Rules of Civil Procedure be set forth as an affirmative defense. From time immemorial, affirmative defenses such as this could not be availed of under a general denial but must be pleaded. Such is still the law, under Rule 8(c) of the Rules of Federal Procedure. Thus, for example, if a defendant in a Court of the United States wishes to rely upon the Statute of Frauds as a defense, the facts making such a defense applicable must be affirmatively pleaded by the defendant, and that is so regardless of whether he is relying upon the Statute of Frauds in force under the law of the state of the forum, or in force under the law of some other state. It is, of course, obvious that just because the statutory affirmative defense arises under the law of another jurisdiction rather than under the law of the forum, the defendant is not thereby relieved from the obligation to set up such statute as an affirmative defense on the ground that the court must take judicial notice of the statute of another state.

The defendants had no right to amend as of course, but only by leave granted in the discretion of the trial court.

There is no claim here that the court abused its discretion.

As was stated by Judge Rifkind in *Schick* v. *Finch*, 8 Fed. Rules Dec. 639 (U. S. Dist. Ct. S. D. of N. Y.) at page 640:

> "Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.A. prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendants' knowledge when the controversy arose."

This was not a situation where defendants sought to amend in order to plead newly discovered evidence. All the facts pertaining to the affirmative defense which defendants sought to plead at such a late date were within defendants' knowledge at the very inception of the litigation and, indeed, from the time the cause of action arose.

In *Blair* v. *U. S.*, 147 Fed. 2d 840, modified on other grounds, 150 Fed. 2d 676: "At the beginning of the trial on October 11, 1943, counsel for defendants asked leave to amend the answer so as to plead" an offset to plaintiff's claim (p. 842 of the opinion). An application to amend the answer was denied and on appeal the Court of Appeals said at page 843:

> "Before amendment defendant's answer did not suggest a liability on the part of plaintiffs for liqui-

dated damages on account of delay. Such an allegation would undoubtedly raise new questions, both of law and fact. The action was commenced March 3, 1943. Answer was filed July 15, 1943, 3 months before the trial began. In these circumstances the trial court might well have concluded that it would be unfair to permit the amendment and force plaintiffs to trial on the new issue thus tendered. The application was addressed to the judicial discretion of the Court and in the absence of an abuse of such discretion the ruling will not be reversed on appeal (citing cases). There was here no abuse of discretion."

Of course defendants were not at liberty to prove such an affirmative defense under mere denials. A situation identical to that presented on this appeal is found in the case of *Clark* v. *Monarch Engineering Company*, 248 N. Y. 107. There as here the plaintiff had sued at common law for negligence. The defendant there as here had attempted to invoke the Workmen's Compensation Act as a bar to the suit, citing the section of the New York law similar to that of the Pennsylvania Act. The Court, however, held that it was up to the defendant to plead and prove that the plaintiff's remedy lay exclusively under the Workmen's Compensation Law. At pages 111 and 112 of the opinion by Judge Lehman, we find the following:

"Where, however, the general contractor asserts that he is relieved of a common-law liability because the statute (i.e. Workmen's Comp. Law) has imposed upon him a new liability in its place and stead, he should at least plead and prove that he is in fact under the statutory liability. * * * It seems to us quite clear that the Legislature did not intend to provide exemption to the general contractor from common-law liability, at least where no statutory liability is shown to have arisen."

Alexander v. *Alexander*, 140 Fed. Sup. 925, was a suit by a wife against her husband on account of a tort committed in Florida. The trial was in the South Carolina District Court. The defendant moved to amend the answer to plead that under the Florida law a wife cannot sue her husband in tort. The Court denied the application to amend the answer and stated at page 930:

> "Rule 8(c), Federal Rules of Civil Procedure, requires a defense of this character, that is one 'in avoidance' to be affirmatively plead. (Citing case) Rule 12(h), Federal Rules of Civil Procedure, provides that a failure to plead a defense of this character constitutes a waiver of his right to do so."

Throughout the trial the case proceeded on the theory of common law negligence and not on that of Workmen's Compensation. Indeed, as shown by Defendants' Exhibit B, which is a purported contract between the National Producing Co. Inc. and Peaches O'Neill, for the performance of this act, it is specifically and clearly provided in clause SIXTH that "Workmen's Compensation laws of any state, territory or country" are not to apply and that Peaches O'Neill and the girls in her act, including the plaintiff, are all independent contractors and not subject to such statutes. It will be noted that this contract (certified exhibit submitted herewith) is on a printed form of George A. Hamid & Son, 10 Rockefeller Plaza, New York 20, N. Y. (George A. Hamid being a defendant herein).

As was stated in *Waurzonek* v. *Central Hudson Corporation*, 276 N. Y. 412, at page 420:

> "When a party, with meticulous care, enters into a contract which purports to establish a relationship which enables it to escape the burden of paying increased Workmen's Compensation premiums based upon its actual operations, it does not lie in the mouth

> of that party to claim that what it did was not intended to and did not set up the relationship and thus escape the disadvantageous consequences of its actions."

The Supreme Court of Pennsylvania adopts the same view as the New York Court of Appeals in such situations and with regard to the very Pennsylvania statute in question said:

> "This appeal by McDonald presents an oft recurring difficulty. On the one hand we have persons before us, such as Levinson (defendant), endeavoring to escape the effect of the Compensation Act so that they will not be compelled to pay compensation or carry insurance, and, on the other hand, as here, when faced with liability at common law, they strive vigorously to come under the sheltering protection of the act. Appellee is now endeavoring to do the latter as a statutory employer." *McDonald* v. *Levinson Steel Co.*, 302 Pa. 287, at page 292.

The Pennsylvania court then went on to hold, as did the New York court, that the defendant was not a statutory employer and could not avail itself of the shelter of exclusive remedy under the Workmen's Compensation Law.

On a motion to amend a pleading the Court will consider the legal sufficiency of a new defense sought to be added. *Canister Company* v. *National Can Corporation*, 71 Fed. Sup. 45; appeal dismissed, 163 Fed. 2d 683.

Section 203 of the Workmen's Compensation Law, above quoted, by its very terms does not purport to apply to a situation such as this. It is obviously intended to pertain to the erection or construction of a building by a general contractor who retains subcontractors to do part of the work, and in such a situation "laborers" of the subcontractor would be deemed employed by the principal con-

tractor for the purposes of Workmen's Compensation. It is difficult to see how this twenty-one year old girl aerialist in a circus can be deemed a "laborer". Obviously that statute was not intended to govern such a situation. That the word "laborer" is not equivalent to "employee" is manifest from a reading of the statute itself, above quoted, since the statute uses both terms, i.e., "laborer" and "employee". They are obviously not intended to be synonymous.

> "It is one of the accepted canons of construction that statutes must be read so that each word will have a meaning, and not so read that one word will cancel out and render meaningless another; that each word used in an enumeration in a statute of several classes or things must be presumed to have been used to express a distinct and different idea; that every provision of a statute was intended to serve some useful purpose." *Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286, at page 293.

Moreover the Pennsylvania statute relied upon by appellants and quoted above can have no application because the premises were not "occupied or under the control" of appellants. The "premises" were the property of the Altoona shrine organization which before, during and after the circus continued to "occupy" and "control" the "premises". The shrine sold the tickets (fol. 734). The defendants' witness Rowzer testified that he was "Provost Guard" of the temple at the time of the circus and had the responsibility of policing and security on behalf of the temple (fol. 417). Publicity, obtaining local help and sale of tickets were all under the control of the temple and not of appellants (fol. 737). Appellants did not rent the building and thus did not "occupy" or "control" the building under a lease (fol. 737). According to appellants' own witnesses it is not possible to see how they could be deemed to "occupy" or "control" "the premises" within

the purview of the statute. Of course the circus was in the building at the time, but so were the spectators who no more "occupied" or "controlled" the premises within the intendment of the statute than the circus.

Furthermore, it would seem clear here that the plaintiff was an independent contractor and not the employee of anyone. Those who engage acrobats or aerialists have no desire to control the manner and method of performing the work. That is left to the performer or entertainer. Appellant Hamid testified that he did not exercise any control over the girls in plaintiff's act (fol. 1350). The essential element of the relationship between master and servant is therefore lacking and Workmen's Compensation does not apply.

Since under the Pennsylvania Workmen's Compensation Act (77 Purdon's Pennsylvania Statutes, Section 631) notice of a compensation claim must be filed within 120 days of the injury, which was not done, plaintiff would be left without any remedy whatever for the grave, crippling and lifelong permanent injuries she has suffered if this were held to be a compensation case. In justice and fairness appellants are now estopped from making any such contention.

Never at any time did defendants offer to prove that they had considered this as a compensation case and had filed the accident report required from the employer within fifteen days of the injury pursuant to Title 43, Chapter 1, Section 12 of Purdon's Pennsylvania Statutes. Quite the contrary the defendants, as is shown by their Exhibit B above referred to, treated performers as independent contractors not subject to Workmen's Compensation right up until the point on the trial where they sought to amend and escape common law liability after having escaped compensation liability.

The trial court very properly refused to take cognizance of a law which was not applicable to the issues as pre-

sented by the pleadings. As the trial court said (fol. 965), "I think it is unnecessary to take judicial notice in lieu (sic) of that".

Under this issue there is no conflict in the decisions of the circuits, as contended by petitioners. Indeed, petitioners' own brief, citing *Slattery* v. *Marra Brothers, Inc.*, 186 Fed. 2d 134 (C. A. 2), cert. denied, 341 U. S. 915; *In Re Paramount Publix Corp.*, 85 Fed 2d 83 (C. A. 2); *Zell* v. *American Seating Company*, 138 Fed. 2d 641 (C. A. 2), shows that the Court of Appeals for the Second Circuit is well aware of, and follows, the rule that a Federal court takes judicial notice of the law of another state. Here such rule was not applicable. The issue before the trial court and before the Court of Appeals was a very simple one, namely, whether or not at a very late date in the trial, the defendants could, as a matter of right, prove the Pennsylvania law with respect to an affirmative defense which had not been pleaded, and which was in no event pertinent. Nor did the courts below come into conflict with any applicable decision of this Court. Indeed the courts below followed Rule 8(c) of the Federal Rules of Civil Procedure, which rules were prescribed by this Court. The petitioners have shown no ground whatever under Rule 19 of the Rules of this Court for granting a writ of certiorari.

POINT II

There was ample evidence to support a verdict against the defendant Hamid and there were no errors of law which should be reviewed on certiorari.

Commencing at page 9 of petitioners' brief, it is claimed that there are "other errors of law which should be reviewed on certiorari."

A complete answer to petitioners' contention in this regard is contained in the opinion of the Court of Ap-

peals, which is printed in full as an appendix to the petition herein. There is no need, therefore, to burden this Court by belaboring the point.

Furthermore, the errors alleged by the petitioners are not such as justify a review by this Court on writ of certiorari or otherwise. None of the grounds for granting a writ of certiorari prescribed by this Court in its Rule 19 are even alleged to exist by petitioners. The matter was correctly and justly decided by the Court of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

May, 1958.

Respectfully submitted,

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